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No. 83-137

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

LYDIA MELSEN,
Respondent.

BERLITZ SCHOOLS OF LANGUAGES OF AMERICA, INC.,
Petitioner,

vs.

VICKI BARTELT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is a claim for denial of equal pay brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, a "continuing violation" which permits the filing of a claim within 300 days of the issuance of each pay check, or is a plaintiff forever barred from challenging discriminatory compensation if she does not file a charge within 300 days of her hire?

2. Does the "single establishment" limitation of the Equal Pay Act apply to an action for denial of equal pay brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*?

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RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The District Court for the Northern District of California granted summary judgment for defendant and petitioner herein. The Court of Appeals for the Ninth Circuit reversed the granting of summary judgment and remanded for further proceedings. This opinion is reported at 698 F.2d 1003 and appears as appendix A, pages 1 to 11, of Petitioner's Opening Brief. The court below denied

Berlitz's petition for rehearing and rejected its suggestion for rehearing *en banc*. This order appears as appendix B, page 12, of Petitioner's Opening Brief.

JURISDICTION

The opinion of the court of appeals was entered on February 8, 1983. The order denying Berlitz's petition for rehearing and rejecting the suggestion for rehearing *en banc* was entered on April 28, 1983. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Same as set forth at pages 3-5, of Petitioner's Opening Brief.

STATEMENT OF THE CASE

Respondent Lydia Melsen began working for Berlitz in 1968. In 1973, she was appointed Assistant Director, and in 1975, appointed Acting Director of the Oakland, California school. In November 1978, Melsen filed a charge of sex discrimination against Berlitz, and in May 1979, while still employed, filed a Title VII action in the District Court for the Northern District of California alleging that Berlitz paid her lesser salaries, commissions and bonuses than it did her male predecessor and male directors at other Berlitz schools performing substantially equal work requiring substantially equal skill, effort and responsibility. Melsen was terminated by Berlitz in August 1979.

Respondent Vicki Bartelt began working for Berlitz in 1973 as a Management Trainee in Illinois. In July 1977, she was appointed Director of the Palo Alto, California

school. In April 1979, Bartelt was terminated from this position by Berlitz and filed a complaint with EEOC the same month. In January 1980, Bartelt filed a Title VII action in the District Court for the Northern District of California alleging that Berlitz paid her lesser salaries, commissions and bonuses than it did her male predecessor and male directors of other Berlitz schools performing substantially equal work requiring substantially equal skill, effort and responsibility.

In October 1980, petitioner herein filed a Motion for Summary Judgment in each action. Petitioner contended among other things, that both plaintiffs had failed to file timely charges with EEOC, and that both plaintiffs were precluded from advancing claims with respect to school directors employed by Berlitz at its other schools. On December 19, 1980, the District Court granted, in part, Berlitz's Motion for Summary Judgment and dismissed the equal pay claims of both plaintiffs.[1]

On February 8, 1983, the Court of Appeals for the Ninth Circuit, Judge Poole dissenting, reversed the lower court's ruling and remanded the case for further proceedings. The appellate court determined (1) that an equal pay claim is a continuing violation thus rendering plaintiffs' claims timely, and (2) that a plaintiff bringing an equal pay claim under Title VII is not limited to the "single establishment" limitation of the Equal Pay Act,

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[1]Because plaintiff Bartelt's Complaint alleged only denial of equal compensation, the District Court's ruling effectively dismissed her entire action. The court let stand plaintiff Melsen's allegation of retaliation which was also the subject of Berlitz's Motion for Summary Judgment. The parties subsequently stipulated to a dismissal of the retaliation claim.

thus permitting plaintiffs to pursue their claims of unequal pay with respect to directors at certain other schools of defendant Berlitz. Berlitz's petition for rehearing and suggestion for en banc review were denied by the appellate court.

REASONS FOR DENYING THE WRIT

A. The Decision Below Is in Accord with the Unanimous Holdings of Other Circuits That a Policy of Paying Lower Wages to Female Employees Constitutes a Continuing Violation

Respondents Lydia Melsen and Vicki Bartelt contend that they were paid lower wages than their male predecessors and their male counterparts in other schools owned by petitioner Berlitz Schools of Languages of America, Inc. [hereinafter Berlitz] for work requiring the same skill, effort and responsibility. Each respondent filed a charge with the EEOC within 300 days of a payment of the allegedly discriminatory compensation. Notwithstanding this timely filing, petitioner argues that each lawsuit is time barred because if a violation occurred, it occurred only at the time each respondent replaced her predecessor which, in the case herein, was more than 300 days prior to the filing of EEOC charges. That is, Berlitz contends that although it allegedly paid each respondent discriminatory compensation for periods of three years (Respondent Melsen) and one year (Respondent Bartelt), each respondent's claim is time barred because each was filed more than 300 days after respondent replaced her male predecessor.

The Court of Appeals for the Ninth Circuit rejected Berlitz's argument by holding that a new violation occurs

with the issuance of each paycheck and that a "policy of paying lower wages to female employees on each payday constitutes a 'continuing violation.'" Petitioner's Opening Brief, app. A at 3. The court cited *Jenkins v. Home Insurance Co.*, 635 F.2d 310 (4th Cir. 1980) and *Satz v. ITT Financial Corp.*, 619 F.2d 738 (8th Cir. 1980) as support for its holding. In *Jenkins* and *Satz*, the courts of appeals were faced with the same question presented herein, and squarely held that the practice of paying unequal wages is a continuing violation. "The practice of paying discriminatorily unequal pay *occurs not only when an employer sets pay levels, but as long as the discriminatory differential continues.*" *Satz*, 619 F.2d at 743 (emphasis added). Indeed, "[t]his kind of continuing pattern of discrimination has been recognized by commentators as the most obvious type of continuing violation of Title VII." *Id.* at 744 n.10. In *Jenkins*, the court characterized the unequal wages as "a series of separate but related acts throughout the course of Jenkins' employment" occurring each time plaintiff was paid for the prior two-week work period, and stopping only when plaintiff's employment stopped. *Jenkins*, 635 F.2d at 312.

The holding below is in accord not only with *Jenkins* and *Satz*, but also with every other jurisdiction that has ruled on the question. *E.g., Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978); *Egelston v. State University College*, 535 F.2d 752 (2d Cir. 1976); *EEOC v. Akron National Bank & Trust Co.*, 497 F. Supp. 733 (N.D. Ohio 1980); *Schulte v. State of New York*, 533 F. Supp. 31 (E.D.N.Y. 1981). Petitioner is unable to refer the Court to any cases with a contrary holding because the circuits are in unanimous agreement on this issue.

Nevertheless, petitioner seeks to create conflict where none exists by misciting authority from this Court and from other circuits. First, petitioner suggests that a different result should have been reached under the holdings of *Delaware State College v. Ricks,* 449 U.S. 250 (1980) and *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977). However, the opinion below is consistent with both *Ricks* and *Evans.* The court below did not cite *Evans* and *Ricks* in its decision because it correctly perceived that the holdings in those cases were inapplicable to the present case.

In *Ricks,* the plaintiff was denied tenure and terminated one year later. Plaintiff Ricks argued that the statute of limitations should run from the date of the termination rather than the date of denial of tenure. The Supreme Court rejected this argument noting that the discriminatory act was the discrete individual act of denial of tenure and Ricks' subsequent termination merely a consequence thereof. In sum, the Court held that the act of denial of tenure is a specific event which happens on a specific date and that the period for filing a charge begins to run on that date. In finding no continuing violation, Justice Powell noted: "If Ricks intended to complain of a discriminatory discharge, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. But the complaint alleges no such acts." *Ricks,* 449 U.S. at 257 (footnote omitted).

In fact, the Complaints filed by the respondents herein do identify such continuing violations. Each respondent's Complaint alleges that petitioner discriminated by "paying [to each respondent] lesser salaries, commissions, and

bonuses as a female employee than male employees of BERLITZ for doing substantially equal work requiring substantially equal skill, effort and responsibility . . ." both as to their male predecessors at their respective schools and as to male directors of other Berlitz schools. Excerpts of the Clerk's Record, 1:32-2:9, Complaint of Vicki Bartelt, 23:2-11, Complaint of Lydia Melsen. Unlike *Ricks,* respondents herein *did* allege discriminatory acts which continued until the termination of their employment, i.e., the payment of unequal compensation, a "series of *separate* but related *acts* throughout the course of [their] employment" (*Jenkins,* 635 F.2d at 312 (emphasis added)), and a "continuing pattern of discrimination. . . ." *Satz,* 619 F.2d at 744 n.10.[2]

The opinion below is also consistent with *Evans.* In that case, the discriminatory policy of requiring termination upon marriage had completely ceased to exist at the time plaintiff brought charges. Therefore, no continuing *violation* existed, only the present *effect* of a *prior completed act.* In the present case, the discriminatory policy had not ceased when plaintiffs filed their EEOC charges but continued through each respondent's entire course of employment.

Despite the clear distinction between the completed past acts of discrimination in *Evans* and the continuing present

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[2]The inapplicability of *Ricks* to an equal pay claim was recognized in *Schulte v. State of New York,* 533 F. Supp. 31 (E.D.N.Y. 1981): "This court [concludes] that *Ricks* does not apply to these facts, where plaintiffs are challenging on-going terms and conditions of employment. Moreover, numerous courts have concluded that challenges to discriminatory pay practices under the EPA are continuing violations that accrue on each regular payday." *Id.* at 35.

discriminatory acts complained of by respondents, petitioner attempts to characterize the continuing payments of a discriminatory salary as "simply 'a delayed, but inevitable consequence' of the compensation first set upon replacement of their male predecessors." Petitioner's Opening Brief at 11. However, this interpretation would effectively insulate an employer for all time against a claim of unequal wages as long as the employer kept wages low based on an initial discriminatory wage rate not challenged within 300 days of first employment. Following the reasoning of petitioner, the employer could pay a woman employee a discriminatory wage even after promotion as long as salaries were based on the initial unchallenged wage differential. Such a result is illogical and completely inconsistent with the broad reach of Title VII.

Petitioner mistakenly argues that the relevant test is whether respondents' salaries were *modified* in a manner different from that of other school directors after their initial replacement of male predecessors. Petitioner's Opening Brief at 12. This characterization of the problem is simply a self-serving distortion. The relevant inquiry is whether the present wage scales themselves are discriminatory as alleged to be by respondents, just as the inquiry in *Evans* was whether the present seniority system operated in a discriminatory manner.[3]

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[3]Similarly, this Court's ruling in *Chardon v. Fernandez*, 454 U.S. 6 (1981) (notice of future termination began time period in which to file charges where plaintiff had not alleged discriminatory acts subsequent to the date on which the decision to terminate was made) is inapposite in that it involved a completed past act of discrimination rather than allegations of a continuing present violation.

Second, petitioner suggests that the opinion below is inconsistent with employment decisions on continuing violations from other circuits. *See* Petitioner's Opening Brief at 14. However, each case cited by respondent addresses employment decisions that involved *completed past* acts of discrimination: *Milton v. Weinberger,* 645 F.2d 1070 (D.C. Cir. 1981) (denial of promotion); *Heymann v. Tetra Plastics Corp.,* 640 F.2d 115 (8th Cir. 1981) (initial job assignment); *Patterson v. General Motors Corp.,* 631 F.2d 476 (7th Cir. 1980), *cert. denied,* 451 U.S. 914 (1981) (denial of promotion); *Goldman v. Sears, Roebuck & Co.,* 607 F.2d 1014 (1st Cir. 1979), *cert. denied,* 445 U.S. 929 (1980) (job transfer); *Martin v. Georgia-Pacific Corp.,* 568 F.2d 58 (8th Cir. 1977) (denial of transfer). Such holdings in no way diminish the vitality of the unbroken line of cases holding that equal pay violations are violations that recur throughout the course of employment with each discriminatory wage payment.[4]

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[4]For example, one of the cases cited as support for its position by petitioner is *Martin v. Georgia Pac. Corp.,* 568 F.2d 58 (8th Cir. 1977) (denial of job transfer). This case is from the same circuit as and precedes the holding in *Satz v. ITT Fin. Corp.,* 619 F.2d 738 (8th Cir. 1980) in which the court of appeals expressly held that the payment of unequal wages is a continuing violation that occurs as long as the unequal pay continues. *Id.* at 743.

The distinction between "*[c]ompleted* acts such as a termination . . . a job transfer, . . . or discontinuance of a particular job assignment . . ." and "claims of repeated failure to promote and a denial of equal pay [that] involve *ongoing* aspects of the employer-employee relationship," was cogently set forth in *Corbin v. Pan Am. World Airways,* 432 F. Supp. 939, 944 (N.D. Cal. 1977) (emphasis added) (citations omitted).

Trabucco v. Delta Airlines, 590 F.2d 315 (6th Cir. 1979) is likewise inapplicable. There, the court was looking at a completed act of job reclassification and the plaintiff did not contend that her present job classification constituted a Title VII violation.

In addition to misciting this Court's and other circuits' authority, petitioner posits three additional arguments that are without support. First, petitioner suggests that a continuing violation only exists if respondents identified others similarly situated and that respondents must demonstrate a "pattern and practice" of discrimination as found in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 336 (1977). Petitioner's Opening Brief at 12-13.

Petitioner's argument merits several responses. In fact, each respondent has alleged a pervasive policy of sex-based wage discrimination at Berlitz. Throughout the course of her employment, each respondent complained of continuing pervasive unequal treatment. *See* Excerpts of the Clerk's Record, Declarations of Melsen and Bartelt at 154-60.

More importantly however, petitioner is mistaken in its belief that the doctrine of continuing violations is applicable only in claims of class-based discrimination as opposed to individual Title VII claims. The logic of petitioner's argument is that no plaintiff bringing an individual action under Title VII can ever allege a continuing violation. Petitioner will find no support for its argument in the case law. In *Jenkins* and *Fisher v. Dillard University,* 499 F. Supp. 525 (E.D. La. 1980), individual employees alleging discriminatory compensation had "continuing violations" even though they did not allege broad-based, class-type allegations of across-the-board discrimination.

Even in *Ricks,* Justice Powell wrote that plaintiff, who did not make an across-the-board attack of "pervasive" discrimination against the University, could have alleged a continuing violation if the facts supported such a conten-

tion. *Ricks*, 449 U.S. at 257 (footnote omitted). That is, the Supreme Court recognized that an individual could allege a continuing violation so long as he or she alleged those acts which continued throughout and constituted the violation. Justice Powell stated no requirement that the employee also allege a "systematic" policy of discrimination or launch a sweeping attack on an employer's employment practices.[5]

Second, petitioner suggests that *Jenkins* and *Satz* are distinguishable because they dealt with an equal pay comparison between plaintiffs and males *currently* employed by defendant. Petitioner's Opening Brief at 13. However, the practical effect of such an argument would be to leave plaintiffs in single incumbent positions with no protection against blatant sex-based differentials in pay. Several jurisdictions have recognized this illogical result and held that Title VII does not bar equal pay claims merely because a particular job is a single incumbent position. *See Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071 (5th Cir. 1981); *Taylor v. Philips Industries, Inc.*, 593 F.2d 783 (7th Cir. 1979); *Dacus v. Southern Col-*

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[5]In fact, in claiming a continuing violation from the payment of unequal wages, it is unnecessary to allege a discriminatory policy. Each wage payment is itself a discriminatory act. *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980); *Fisher v. Dillard Univ.*, 499 F. Supp. 525, 528 (E.D. La. 1980). In any case, respondents have alleged facts sufficient to establish both a policy of discrimination throughout the course of employment, *and* "a series of separate but related acts" (*see Jenkins*, 635 F.2d at 312). *See* Excerpts of the Clerk's Record, Declarations of Melsen and Bartelt at 154-60.

lege of Optometry, 476 F. Supp. 639 (1979), *aff'd and remanded on other grounds*, 657 F.2d 81 (1981), *cert. denied*, 454 U.S. 1147 (1982).[6]

Third, petitioner claims that the result of the opinion below is to nullify the time requirements of 42 U.S.C. § 2000e-5(e). However, the decision below does nothing of the sort. Rather, it reaffirms that in a claim for denial of equal pay the charging party must file a claim within 300 days of the alleged discriminatory act, i.e., within 300 days of the issuance of the discriminatory paycheck. As such, the opinion below is fully consistent with other circuits and accurately distinguishes between completed past acts of discrimination (*Ricks* and *Evans*) and continuing present discriminatory acts (*Satz* and *Jenkins*). Given the total unanimity of authority with respect to the continuing violation question presented herein, there is no necessity for this Court to grant the Petition and review the decision below.

B. The Court Below Properly Applied County of Washington v. Gunther in Holding That the "Single Establishment" Limitation of the Equal Pay Act Is Not Incorporated Into An Equal Pay Claim Under Title VII

Petitioner contends that the "single establishment" requirement of the Equal Pay Act, 29 U.S.C. § 206(d)(1), is incorporated into an equal pay claim under Title VII,

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[6]The appropriateness of making pay comparisons under the Equal Pay Act between plaintiffs and prior employees was set forth in *County of Washington v. Gunther*, 452 U.S. 161, 201-02 (1981); *id.* at 178 n. 19 (Rehnquist, J., dissenting). Thus even if it was necessary for plaintiffs to meet the criteria of the Equal Pay Act to state a claim under Title VII (petitioner's second argument, discussed *infra*), that requirement is met here. *See* Petitioner's Opening Brief, app. A at 3-4 n.1.

by the Bennett Amendment, 42 U.S.C. § 2000e-5(e), and that such requirement bars the claim of respondents herein that their pay was less than that of male directors employed at petitioner's schools in other locations.[7]

The Court of Appeals for the Ninth Circuit rejected petitioner's argument under the recent authority of *County of Washington v. Gunther,* 452 U.S. 161 (1981). The *Gunther* Court held that the Bennett Amendment requires incorporation only of the four affirmative defenses of the Equal Pay Act into Title VII. *Id.* at 168-71. This Court's precise articulation on the matter specifically stated that the "first part" of the Equal Pay Act which is "purely prohibitory" (and which contains the "single establishment" limitation) is not made a part of Title VII by the Bennett Amendment because it authorizes nothing. Only the "second part", containing the affirmative defenses, is so incorporated. *Gunther,* 452 U.S. at 169.

Petitioner argues that *Gunther* is distinguishable on its facts in that, because respondents herein make claims of equal pay for equal work, which ultimately was not the basis of the female sheriffs' complaints in *Gunther,* the *Gunther* logic does not apply. That is, where plaintiffs make an *equal pay* claim under Title VII the *entire* Equal Pay Act, including the single establishment limitation, applies.

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[7]Petitioner suggests that the question to be decided is "whether Equal Pay Act standards govern equal pay claims brought under Title VII. . . ." Petitioner's Opening Brief at 15. However, this case does not present the appropriate occasion to review the entire relationship between Title VII and the Equal Pay Act. The issue here is a narrow one—whether the "single establishment" clause must apply to equal pay Title VII claims.

However, adoption of such a proposition by this Court would ignore several pressing points. First, the Supreme Court now has held specifically that *only* the four defenses of the Equal Pay Act come within the ambit of Title VII. This holding was not as narrow as petitioner urges. The Court gave full consideration to the legislative history of the Bennett Amendment (*id.* at 171-76), the broad remedial purposes of Title VII (*id.* at 178), and the relationship between Title VII and the Equal Pay Act (*id.* at 178-80). Nowhere in the *Gunther* opinion does the Court's language suggest the narrow application now urged by petitioner herein, and petitioner does not refer the Court to any such language in its earlier opinion.

Petitioner does refer this Court to language in the appellate court's *Gunther* decision that equal pay claims under Title VII are governed by Equal Pay Act standards. Petitioner's Opening Brief at 17-18. However, petitioner has taken this language out of context. Although the appellate court in *Gunther* stated that plaintiffs must show that their "job requirements are substantially equal" to their male comparables (*Gunther v. County of Washington*, 623 F.2d 1303, 1321 (9th Cir. 1979) (Supp. Opn. on Denial of Rehearing)), the reference to the Equal Pay Act standards does not detract from the Ninth Circuit's and this Court's holding that *only* the four defenses of the Equal Pay Act are incorporated within wage claims brought pursuant to Title VII. In fact, the Ninth Circuit's reference to the Equal Pay Act standards was not because the Equal Pay Act standards were incorporated into Title VII, but only because they were "relevant in this inquiry". *Id.* The holding in the Ninth Circuit *Gunther* opinion remained clear—

the Bennett Amendment incorporates within Title VII only the four defenses of the Equal Pay Act, and nothing else.

The only case that has dealt precisely with the relationship between the "single establishment" clause of the Equal Pay Act and Title VII prior to the Ninth Circuit's appellate opinion herein, *Wetzel v. Liberty Mutual Insurance Co.*, 449 F. Supp. 397 (W.D. Pa. 1978), recognized that while Equal Pay Act standards may be "relevant" in determining equal pay claims brought pursuant to Title VII, the conclusion did not follow that the single establishment limitation was incorporated within Title VII by the Bennett Amendment.

> The only remaining question, then, is whether Title VII also contains a requirement that plaintiffs prove their case "establishment" by "establishment." Although the cases discussed . . . have uniformly held that a Title VII plaintiff must, in this kind of case, prove that the two jobs in question are substantially equal in skill, effort and responsibility, we have found no precedent precisely on this point . . . . Because *Title VII nowhere contains a requirement similar to the separate "establishment" of the Equal Pay Act, . . . and because the Bennett Amendment fully serves its function without incorporating the establishment requirement into Title VII, we conclude that there is no such limitation on Title VII relief with regard to discrimination in compensation.*

Id. at 407 (emphasis added).[8]

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[8]Several Title VII equal pay cases after *Gunther* make reference to the Equal Pay Act requirement of 'substantially equal skill, effort and responsibility.' *E.g., Odomes v. Nucare, Inc.*, 653 F.2d 246 (6th Cir. 1981); *Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403 (S.D. N.Y. 1982); *Kouba v. Allstate Ins. Co.*, 523 F. Supp. 148 (E.D. Cal. 1981), *rev'd on other grounds and remanded*, 691 F.2d

The second fallacy in petitioner's argument follows from its failure to recognize that the Equal Pay Act and Title VII are separate statutes which were meant to *supplement* rather than supplant one another. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974); *IUE v. Westinghouse Electric Corporation*, 631 F.2d 1094, 1101 (3d Cir. 1980). In *Gunther*, the Court recognized that because the Equal Pay Act was *not* incorporated *en toto* into Title VII, plaintiffs could choose between the statutes and use them in different ways. The Court apparently saw no problem with such a possibility and, in fact, argued that such a choice affirmed the vitality of both statutes. The Court stated:

> The argument in the dissent that under our interpretation, the Equal Pay Act would be impliedly repealed

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873 (9th Cir. 1982). However, the reliance on this standard is the result of *judicial interpretation* and not because the Bennett Amendment mandates its incorporation from the Equal Pay Act. *Judicial* incorporation of the equal skill, effort and responsibility standards of the Equal Pay Act for *equal pay* claims under Title VII is quite a different matter from incorporation of all other statutory *limitations* of the Equal Pay Act. The *Gunther* Court addresses this precise point:

> Under petitioners' reading of the Bennett Amendment, only those sex-based wage discrimination claims that satisfy the "equal work" standard of the Equal Pay Act could be brought under Title VII. In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man *in an equal job in the same establishment*, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation.

Gunther, 452 U.S. at 178-79 (emphasis added).

> and rendered a nullity . . . is mistaken. Not only might the substantive provisions of the Equal Pay Act's affirmative defenses affect the outcome of some Title VII sex-based wage discrimination cases, . . . but the procedural characteristics of the Equal Pay Act also remain significant. For example, the statute of limitations for backpay relief is more generous under the Equal Pay Act than under Title VII, and the Equal Pay Act, unlike Title VII, has no requirement of filing administrative complaints and awaiting administrative conciliation efforts. Given these advantages, many plaintiffs will prefer to sue under the Equal Pay Act rather than Title VII.

Gunther, 452 U.S. at 175 n. 14

Third, and perhaps most important, incorporation of the entire Equal Pay Act within Title VII for *equal pay claims* would create the very abuses and inconsistencies petitioner fears. It would create the anomalous situation whereby women with equal pay claims under Title VII would have *lesser* rights than persons who claim denial of equal pay under Title VII based on race, color, religion, or national origin.

This disparity can be seen in regard to the question of multiple establishments. A person raising a race claim under Title VII may compare his or her treatment with the treatment of persons of the same race at other facilities of the employer. Similarly, under a Title VII race claim an employer may justify wage differentials precisely because they occur at different locations provided they are not the result of intent to discriminate. 42 U.S.C. § 2000e-2(h). The Equal Pay Act encompasses sex claims only. 29 U.S.C. § 206(d). Therefore, if respondent's arguments were ac-

cepted and the "single establishment" portion of the Equal Pay Act were incorporated into Title VII, females making equal pay claims would be the only individuals making use of Title VII who could *not* raise the issue of multiple facilities.

Ironically, the result of petitioner's argument would be that *male* employees, suing on a wage disparity claim under Title VII, *e.g., Boyd v. Madison County Mutual Insurance Co.*, 653 F.2d 1173 (7th Cir. 1981), would have a broader remedy than similarly situated women, allegedly because of a statute meant to eradicate wage discrimination against *women*. If "consistency" in application of the statutes is truly the goal, such anomalies should be avoided. The Court's holding in *Gunther*, that only the four defenses of the Equal Pay Act are incorporated into Title VII, furthers that goal.

The court below, in ruling against petitioner herein, correctly interpreted *Gunther* to apply to all sex-based wage discrimination, including equal pay claims. *See* Petitioner's Opening Brief, app. A at 7.[9] The court considered petitioner's claim that a decision contrary to its position would thwart the policies of the Equal Pay Act. In rejecting petitioner's dire prediction, the court correctly recognized the procedural and substantive differences between Title VII and the Equal Pay Act that serve to ensure the vitality and integrity of each statute and provide alternative the-

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[9]Even assuming, *arguendo*, that *Gunther* does not apply to Equal Pay claims, the underpinning of that case and the reasoning of the court below, amply demonstrate that the same result would be required in the present case. This conclusion is further supported by the reasoning in *IUE v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1101 (3d Cir. 1980) and *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397, 407 (W.D. Pa. 1978).

ories to plaintiffs seeking redress from sex-based employment discrimination. *Id.*

The court below considered petitioner's argument and correctly rejected it. The authority of *Gunther* clearly encompasses the issue raised herein. Petitioner repeatedly asserts that there is confusion and uncertainty over what standards govern equal pay claims brought under Title VII. However, the only uncertainty before this Court is that created by petitioner in the hope of winning review. Such review is unnecessary and should be denied.

CONCLUSION

Because there is no conflict between circuits and because the court below correctly decided the issues presented herein, respondents respectfully request that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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